FILE COPY

Supreme Court, U. S.
FILED
MAY 19 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 803

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BASALT ROCK CO., INC.
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

FRANCIS R. KIRKHAM,
SIGVALD NIELSON,
HARRY R. HORROW,
MURRAY GARTNER,
225 Bush Street, San Francisco 4, California,
Attorneys for Respondent.

Table of Contents

	Page
Opinions below	1
Question presented to the Court of Appeals	1
Question presented to this Court	2
Statement of the case	2
Argument	6
A. The decision of the Court of Appeals is correct	7
B. No question of importance as to the effect of the administrative interpretation of the revenue laws is involved	11
C. There is no conflict of decisions and the petition presents no question of importance	15
Conclusion	17

Table of Authorities Cited

Cases	Pages
Brown Shoe Company, Inc. v. Commissioner, No. 445, this Term	10
Burnet v. Chicago Portrait Co., 285 U.S. 1	14
Commissioner v. John Breuner Company, 179 F.2d 685, No. 805, this Term	12, 16, 17
Commissioner v. Busch's Kredit Jewelry Co., Inc., 179 F.2d 298, No. 804, this Term	12, 13, 16
Commissioner v. Rickenberg, No. 491, this Term	13
Commissioner v. South Texas Co., 333 U.S. 496	7, 11
Hadley Furniture Co. v. U.S., 87 F.Supp. 590	12
Haggar Co. v. Helvering, 308 U.S. 389	14
Kimbrell's Home Furnish., Inc. v. Commissioner of Int. Rev., 159 F.2d 608	12
Sokol Brothers Furniture Co. v. Commissioner, 8 T.C.M. 239	15
United States v. Factors & Finance Co., 288 U.S. 89	14
United States v. Mo. Pac. R. Co., 278 U.S. 269	14
West End Furniture Co., 6 T.C. 557	14

Miscellaneous

Hearings before Senate Finance Committee, H.R. 7378, Revenue Act of 1942	14
Hearings before House Committee on Ways and Means on Revenue Act of 1942	14
Senate Report No. 1631, 1942-2 Internal Revenue Bulletins 504, 530	8

In the Supreme Court
OF THE
United States

No. 803

OCTOBER TERM, 1949

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BASALT ROCK CO., INC.
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Tax Court (R. 148-170) and the dissenting opinions (R. 170-179) are reported at 10 T.C. 600. The opinion of the Court of Appeals (R. 219-224) is reported at 180 F.2d 281.

QUESTION PRESENTED TO THE COURT OF APPEALS.

The question before the Court of Appeals was whether the phrase "corporation surtax net income, computed under Section 15" in section 710(a)(1)(B) of the Internal

Revenue Code (part of the Excess Profits Tax Act) means the specific corporation surtax net income computed under section 15 of Chapter 1 of the Code, on which the surtax is imposed.

QUESTION PRESENTED TO THIS COURT.

The question before this Court is whether grounds appear, under the rules governing the Court's certiorari jurisdiction, for the granting of the writ.

Respondent prays that this Court deny the petition. It is respectfully submitted that among all of the grounds on which this Court exercises its discretion to grant the writ, there is not one which justifies its granting in this case. No conflict of decisions exists. The decision below is clearly correct. The case involves a narrow, nonrecurring question under the now repealed Excess Profits Tax Act which was applicable to an extremely limited group of taxpayers. So far as is known only one other case involving the point is pending in any Court. No principle of general or continuing importance in the administration of the revenue laws is involved.

STATEMENT OF THE CASE.

This case involves respondent's excess profits tax for the year 1942. One single issue of law was presented to the Court of Appeals. It concerned the construction of section 710(a)(1)(B) of the Internal Revenue Code, the

familiar 80 per cent limitation on total income and excess profits taxes, as applied to a limited group of taxpayers who, during the effective period of the excess profits tax law, made the special election permitted by section 736(b) of the Code to compute income from long-term contracts on the percentage-of-completion basis of accounting in arriving at "adjusted excess profits tax net income."

The excess profits tax was measured by section 710(a)(1)(A) or section 710(a)(1)(B), whichever resulted in the lesser tax.

Section 710(a)(1) provided:

"Sec. 710. IMPOSITION OF TAX.

(a) *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess profits net income, as defined in subsection (b), of every corporation * * * a tax equal to whichever of the following amounts is the lesser:

(A) 90 per centum of the *adjusted excess profits net income,* or

(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 * * * [i.e., the normal tax and surtax] equals *80 per centum of the corporation surtax net income, computed under section 15* * * *."

The last italicized phrase of the quoted section poses the legal question involved in this case. The facts giving rise to the question are stipulated, the findings of fact of the Tax Court being simply an adoption of these stipulated facts:

Respondent is a California corporation engaged in shipbuilding and the manufacture of concrete aggregates, road and fuel oils, and building material (R. 54). During the year 1942, and prior and subsequent thereto, part of its operations consisted of the performance of long-term contracts, that is, contracts requiring more than 12 months to perform. In 1942 respondent performed work on six such contracts, of which two were completed during the year and four were not completed until a later year (R. 55-56).

The method of accounting regularly employed by respondent with respect to long-term contracts was the completed contract method (R. 55). Under this method gross income from such contracts is included, and all expenditures allocable thereto are deducted, in the taxable year in which the contract is completed. This method clearly reflected respondent's net income and was consistently followed by it. Its long-term contract income for all corporate purposes was computed on this basis, and its federal income taxes (normal tax and surtax) for the year 1942 and for previous and subsequent years were computed, as they were required to be computed, on the same basis (R. 55).

By the Revenue Act of 1942 Congress amended the Excess Profits Tax Act by adding a provision intended to afford special relief to taxpayers engaged in the performance of long-term contracts. That amendment, section 736(b), provided in part:

> "In the case of any taxpayer computing income from contracts the performance of which requires more than 12 months * * * it may elect, in its return

for such taxable year for the purposes of this subchapter, * * * to compute, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, such income upon the percentage of completion method of accounting."

Respondent made the election provided in the foregoing section. In its excess profits tax return for the taxable year 1942, therefore, it computed its income from long-term contracts on the percentage of completion method of accounting to arrive at its "adjusted excess profits net income." Both parties agree that taxpayer correctly thus computed its adjusted excess profits net income and therefore there is no dispute as to the amount of tax tentatively imposed by section 710(a)(1)(A).

By the terms of the statute, however, it was necessary to compute the tax tentatively imposed by section 710(a)(1)(B) since the tax actually imposed is the lesser of the two tentative taxes.

In computing this tax respondent turned, as section 710(a)(1)(B) directed, to its "corporation surtax net income, computed under section 15." The Commissioner contended, however, that while this income was the proper measure of respondent's surtax, it was not the measure of the 80 per cent limitation on the *combined* surtax, normal tax and excess profits tax. Instead, the Commissioner's regulation, *issued under section 736(b)*, purported to redefine the term used in section 710(a)(1)(B) by requiring respondent to use, in arriving at its *corporation surtax net income* when used as the measure of the 80 per cent limitation, the special percentage-of-completion

method of accounting that section 736(b) permitted respondent to use in arriving at its *adjusted excess profits net income* under Subchapter 2E (the Excess Profits Tax Act).

The Court of Appeals, agreeing with the views expressed in the forceful opinions of the five dissenting members of the Tax Court, rejected the Commissioner's contention. It held that the provisions of section 710(a)(1)(B) are clear and explicit; that the actual corporation surtax net income upon which the surtax is based and which is computed in accordance with the taxpayer's regular methods of accounting is the measure of the 80 per cent limitation; and that the Commissioner's regulation calling for the diametrically opposite result is inconsistent with the statute.

ARGUMENT.

The Government advances only two reasons for granting the writ in this case: (1) That the decision raises an important question concerning the deference to be accorded to the administrative interpretation of the revenue laws; and (2) that the decision below presents a question of importance to the revenue under the provisions of the Excess Profits Tax Act.

Neither of these reasons has substance. Before discussing them, however, we point out that the decision of the court below is clearly correct.

A. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

In 1940, to provide the additional revenue required for the wartime economy, Congress enacted the Excess Profits Tax Act. This act was a separate chapter (Subchapter 2E) of the Internal Revenue Code. It imposed a tax on the special statutory "adjusted excess profits net income"—an income computed under numerous special provisions and designed, of course, to approximate the excess profits arising from the war economy.[1] This artificial income bore no necessary relation to the taxpayer's net income as defined in the income tax law. It might be, and in many cases was, zero, as when the excess profits tax credit exceeded the excess profits net income. In many cases, of course, it was substantial. This "adjusted excess profits net income" was subjected to a high rate of tax—90 per cent in the tax year in question; 95 per cent before the war was over. This excess profits tax was in addition to the ordinary income taxes imposed by Chapter 1 of the Internal Revenue Code. At all times these ordinary income taxes continued to be imposed upon the taxpayer's ordinary corporate income, i.e., the "normal tax net income" and the "surtax net income,"[2] both of which were computed—as from the beginning of the tax laws they have

---

[1] *Commissioner v. South Texas Co.* (1948) 333 U.S. 496, 497.

[2] With a credit (not here involved)—the section 26(e) credit—which assured that the amount of the excess profits net income subject to tax at the 90 or 95 per cent rate would not again be subject to tax at the normal tax and surtax rates (section 26(e), I.R.C.).

been computed—under the taxpayer's regular accounting methods.[3]

In 1942, when Congress increased the excess profits tax rate on the "adjusted excess profits net income" to 90 per cent[4] it was concerned with the over-all effective rate of the *combined* normal tax, surtax and excess profits tax. Accordingly it enacted the 80 per cent limitation of section 710(a)(1)(B). Its purpose is clear from the legislative history.[5] It adopted as the limitation on

---

[3]Section 15:

"(a) CORPORATION SURTAX NET INCOME.—For the purposes of this chapter, the term 'corporation surtax net income' means the net income minus [certain credits] * * *."

Section 41:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period * * * *in accordance with the method of accounting regularly employed in keeping the books of such taxpayer;* * * *."*

[4]Revenue Act of 1942, c. 619, sec. 202, 56 Stat. 798, 899.

[5]Senate Report 1631, 1942-2 Internal Revenue Bulletins, pp. 504, 530, 636:

"Your committee feels that in no case should more than 80 per cent of *corporate profits* be taken in normal tax, surtax, and excess-profits tax. Consequently, the bill limits the over-all effective rate of these taxes to 80 per cent of the *surtax net income* before its reduction by the credit for the income subject to excess-profits tax. The effect of this provision is to reduce the excess-profits tax in such cases to an amount which when combined with the normal tax and surtax will not exceed the 80 per cent limitation."

* * * * * * *

"This section * * * amends section 710(a)(1) of the Code by inserting in lieu of the rate table now set forth therein a provision imposing the tax at a flat rate of 90 per cent of the adjusted excess profits net income. Your committee, however, believes that the sum of the corporate normal tax, surtax, and excess profits tax should not exceed 80 per cent of the corporation surtax net income (computed without any credit for income subject to excess profits tax). It has therefore amended this section to provide that the excess profits tax should be the lesser of the following: 90 per cent of

these *combined* taxes—*not* the artificial income arrived at under the excess profits tax chapter—but the "corporation surtax net income" computed under Chapter 1, that is, that income which represents the taxpayer's ordinary "corporate profits".[6] Clearly it never was intended, as the Commissioner's regulation purports to provide, that this measure should be altered by turning it into a hybrid income, computed in part under the concepts employed in arriving at the surtax net income and in part under those employed in arriving at the adjusted excess profits net income.

As pointed out by Judge Van Fossan in his dissenting opinion in the Tax Court (R. 171-172):

> "It is my judgment that petitioner is amply fortified in his contention that the term 'corporation surtax net income' denotes a specific concept which for any year can be only the precise amount arrived at under section 15 of Chapter 1, I.R.C., and that section 710(a)(1)(B) in no way suggests a new concept of corporation surtax net income. On the contrary, Congress, by the use of the term 'the corporation surtax net income' amplified by the phrase 'computed under section 15' and the reference to 'Chapter 1' indicated clearly that the 80 per cent limitation was to be based on the actual corporation surtax net income on which the corporation's surtax liability is imposed. In my judgment, section 710(a)(1)(B) was calculated to provide an alternative measure of the excess profits tax

---

adjusted excess profits net income, or an amount which when added to the tax imposed by Chapter 1 (other than section 102) equals 80 per cent of the corporation surtax net income computed without the credit provided in section 26(c) for income subject to excess profits tax."

[6]See footnote 5.

independent of the measure of such tax under section 710(a)(1)(A).

* * * * *

And again by Judge Kern (R. 179):

> In my opinion section 710(a)(1)(B) in using the words and figures '* * * 80 per centum of the corporation surtax net income, computed under section 15 * * *' means exactly what it says and should not be construed to read '* * * 80 per centum of the corporation surtax net income, computed under section 15 and/or section 736(b) of subchapter E of Chapter 2 * * *'."

The Commissioner's theory—that the election exercised under section 736(b) must necessarily affect section 710(a)(1)(B) since it affects section 710(a)(1)(A)—is false logic. Actually, the election affects section 710(a)(1)(A) because it affects the other sections of the Excess Profits Tax Act, beginning with section 711, which in their entirety relate to the determination of "adjusted excess profits net income", the measure of the excess profits tax used in section 710(a)(1)(A). But the alternative measure of the excess profits tax used in section 710(a)(1)(B), "corporation surtax net income," *is not mentioned* elsewhere in the excess profits tax chapter. It is defined wholly in Chapter 1,[6a] and cannot be affected by an election which is operative only in the excess profits tax chapter.

[6a] Section 728, I.R.C., provided: "The terms used in this subchapter shall have the same meaning as when used in Chapter 1." Cf. *Brown Shoe Company, Inc. v. Commissioner*, No. 445, this Term, decided May 15, 1950.

The Commissioner ignores this manifest intent of Congress and suggests (Petn., p. 11) that his regulations are necessary to avoid possible "vagaries" that "might" ensue from using "two inconsistent accounting methods." The basic mistake in this reasoning is that the Commissioner treats sections 710(a)(1)(A) and 710(a)(1)(B) as though they were inconsistent when they are "alternative." "Consistency" in the tax law requires that the same accounting method shall be used in computing items of income and items of deduction in arriving at a measure of a tax.[7] Here the measure of tax used in section 710(a)(1)(A) is computed consistently from beginning to end under the specially elected method of accounting. The measure of tax used in section 710(a)(1)(B) is computed consistently from beginning to end under the taxpayer's regular method of accounting.

B. NO QUESTION OF IMPORTANCE AS TO THE EFFECT OF THE ADMINISTRATIVE INTERPRETATION OF THE REVENUE LAWS IS INVOLVED.

The Commissioner urges that the court below failed to follow the decisions of this Court with respect to the deference to be paid to his regulations. But there is no quarrel as to the governing principles. As the Commissioner himself says, the court properly held the regulation invalid if it was "plainly inconsistent with the statute" (Petn., p. 5). The sum of his complaint is rather that the court, "unaided by any language in section 736 (b) or the other excess profits tax provisions," held the regulation invalid (Petn., p. 8). Actually, it is the Commissioner's regulation that is "unaided by any language" in the statute.

---

[7] *Commissioner v. South Texas Co.* (1948) 333 U.S. 496, 501.

The Commissioner tries to make it appear that there has developed in the lower courts a certain disregard for his regulations. He says: "The present case is not an isolated holding that provisions of the Commissioner's Regulations under the Excess Profits Tax are invalid" (p. 14). He calls attention to the cases of *Commissioner v. John Breuner Company* and *Commissioner v. Busch's Kredit Jewelry Co., Inc.*, in which another regulation was held invalid. He also mentions that that same regulation had previously been held invalid in *Kimbrell's Home Furnish., Inc. v. Commissioner of Int. Rev.*, 159 F.2d 608.

The fact that the courts of appeals of three circuits—and recently Judge Ford in the district court of the First Circuit[8]—all held that a part of the regulation under section 736(a) was invalid hardly indicates that there is among those courts an erroneous conception of the rule of law announced by this Court. On the contrary, the fact that so many of the lower courts have reached the same result on independent examination would seem adequate evidence that the Commissioner's regulation *is* invalid.

Since so many courts have agreed on the invalidity of the regulation involved in the *Breuner, Busch's Kredit* and *Kimbrell's Home Furnishings* cases, the imagined revolt against the Court's pronouncements on the weight to be given his regulations resolves into the one decision in this case. It is unnecessary, of course, to refer to the many regulations of the Commissioner which have been and are being held valid in the courts of all the circuits, nor is it necessary to point out that, of course,

[8] *Hadley Furniture Co. v. U. S.*, 87 F. Supp. 590.

with rare exceptions his regulations are sustained. In short, the Commissioner views with alarm a situation which does not exist. There is, in fact, no misunderstanding among the lower courts as to the effect of this Court's decisions on the weight to be accorded to the Commissioner's regulations. Thus, in the *Busch's Kredit Jewelry Co.* case itself, in the opinion of the court, Judge A. N. Hand said:

> "The words of Mr. Justice Black, * * * at page 501 * * * of his opinion in the South Texas case, to the effect that Treasury Regulations should not be overruled 'unless unreasonable and plainly inconsistent with the revenue statutes,' would not seem to sustain the regulation before us. While the statement enunciates a familiar rule, we think it has no application to the case at bar for the reason that Regulation 112, § 35.736(a)-2, if applied to the facts before us would fly in the face of the natural and reasonable meaning of Section 736(a) of the Code. We agree with the result reached by the Fourth Circuit in *Kimbrell's Home Furnishings, Inc. v. Commissioner, supra.*"[9]

---

[9]In his petition for a writ of certiorari in the case of *Commissioner v. Rickenberg*, No. 491, this Term, the Commissioner also tried to give magnified significance to the fact that the lower court had held a part of a regulation invalid. In words very similar to those in his present petition, the Commissioner said:

> "In declaring Section 81.15 of Treasury Regulations 105 invalid as applied to the community property acquired after July 29, 1927, the Court of Appeals erroneously disregarded the principles established by numerous decisions of this Court that a Treasury regulation must be sustained unless it is plainly inconsistent with the statute and that, as a contemporaneous construction by the authority charged with administration of the statute, it is not to be overruled except for weighty reasons. See, e.g., *Commissioner v. South Texas Co.*, 333 U.S. 496, 501. The regulation here should have been sustained under these principles."

This Court, of course, denied that petition.

The Commissioner also asks that special weight be given to his regulation as a contemporaneous construction of the statute by its administrators. He fails to mention that from the time the question first arose his construction of section 710(a)(1)(B) was challenged by the Staff of the Joint Committee of Congress on Internal Revenue Taxation. For a considerable period that Committee withheld approval of refunds proposed by the Commissioner on the ground, expressed by its Chief of Staff who assisted in drafting the Revenue Act of 1942 and who testified before the committees of Congress in connection with the bill,[10] that the Commissioner's regulation was contrary to the statute (R. 134, 135).[11] In addition, the first time the question came before the Tax Court the point was decided in accordance with the conclusions of the Chief of Staff of the Joint Committee and with those now announced by the court below.[12] The Joint Committee final-

---

[10]See hearings before Senate Finance Committee on H.R. 7378, Revenue Act of 1942, 77th Cong. 2nd Sess. Vol. 1, pp. 77 et seq.; hearings before the House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong. 2nd Sess. Vol. 2, p. 1943.

[11]It is settled, of course, that where administrative construction has not been consistent and uniform, it "will be taken into account only to the extent it is supported by valid reasons."

Burnet v. Chicago Portrait Co. (1931) 285 U.S. 1, 16;
United States v. Mo. Pac. R. Co. (1929) 278 U.S. 269, 280;
Haggar Co. v. Helvering (1940) 308 U.S. 389, 398;
United States v. Factors & Finance Co. (1933) 288 U.S. 89, 95-96.

[12]*West End Furniture Co.*, 6 T.C. 557. The first opinion of the court in that case, printed at R.102-119, directed the computation of the 80 per cent limitation in accordance with the decision of the court below. The Commissioner filed a motion requesting the court to delete this portion of its opinion on the ground that the point was not before the court for decision (R. 121). The taxpayer having no objection, this motion was granted (R. 120). While in the circumstances the ruling is not authoritative, it illustrates the early challenge to the validity of the Commissioner's regulation. It is of particular interest to note the factual situation that arose in the

ly (in 1948) withdrew its objections. The fact remains that its contemporaneous construction was the same as the decision of the court below.

C. THERE IS NO CONFLICT OF DECISIONS AND THE PETITION PRESENTS NO QUESTION OF IMPORTANCE.

There is no conflict of decisions. The question involved is a narrow, highly technical point of statutory construction which applied to an extremely limited group of taxpayers. The provisions of the Excess Profits Tax Act which are here involved were enacted in 1942. They were in force until the end of 1945. During that entire period only 125 taxpayers made an election under section 736(b)[13], and of these an insignificant number were within the 80 per cent limitation. Five years have now elapsed since the law was repealed. In all of that time only two cases have arisen in the courts involving the point,[14] and on the Commissioner's own statements only twelve other taxpayers are possibly affected. Within this small group the regulation, as the Commissioner himself points out,

---

West End Furniture case by virtue of the application of the Commissioner's rule—a situation which compelled the court's conclusion that the regulation simply could not square with the statute. In that case the "corporation surtax net income," when recomputed in accordance with the Commissioner's regulation to form the 80 per cent limitation, resulted in an anomalous figure *less* than the taxpayer's Chapter 1 taxes. Such a result never could have been contemplated by Congress, since section 710(a)(1)(B) in so many words provides that the alternative excess profits tax shall be in an amount which when "added" to the Chapter 1 taxes equals 80 per cent of the corporation surtax net income.

[13]According to figures supplied respondent by the Bureau of Internal Revenue.

[14]The case at bar and *Sokol Brothers Furniture Co. v. Commissioner*, referred to at page 16 of the Government's petition.

operates fortuitously, in some cases producing a greater tax, in others a lesser one, with no adverse over-all effect upon the revenue.[15] And certainly the Commissioner's position gains no added weight because he approved several refunds to taxpayers benefitted by his regulations at a time when the Tax Court had divided on their validity and the question was before the court below on the appeal of this respondent.

In the last sentence of the petition, without prior reference or any explanation, the Commissioner refers to the pendency of fourteen additional cases involving section 721. How the application of that section which involves the exclusion from excess profits net income of so-called "abnormal income" could be affected by the outcome of this case is nowhere disclosed.

Finally, there is an implication in the Government's petition that *Breuner, Busch's Kredit* and this case are related, and that in some manner the filing of petitions in the three cases simultaneously adds weight to the separate prayers for the writ in each. As the most casual inspection shows, the case at bar and the other two are wholly unrelated. In the court below the Government was

---

[15]While, as the Commissioner says, the amount of tax involved in this particular case for the tax year in question is approximately $1,300,000, he concedes that if his regulations were applied to respondent in subsequent years less revenue might result in those years. The over-all effect of the Commissioner's regulation was emphasized by the Government in its opening statement in this case (R. 91-92):

> "I believe it important to emphasize, if your Honor please, that both of these rules here, both of these positions, can work out in favor of the government or in favor of the taxpayer. It is almost fortuitous as to one case or another whether it will result in a deficiency or a refund."

at pains to point out the lack of any similarity in the cases.[16]

CONCLUSION.

The decision below is correct. There is no conflict of decisions. No question of importance is presented. The petition should be denied.

Dated, San Francisco, California,
May 17, 1950.

FRANCIS R. KIRKHAM,
SIGVALD NIELSON,
HARRY R. HORROW,
MURRAY GARTNER,
Attorneys for Respondent.

---

[16]In its brief in the *Breuner* case in the Court of Appeals the Government pointed out (pp. 25-26):

"The question involved in the *Kimbrell's* case and in this [the *Breuner*] case, it is readily apparent, is substantially different from that involved in the *Basalt Rock Co.* case. * * *

In the instant case * * * the question is *altogether different*, namely, whether the mere accrual of uncollected installment profits for excess profits tax purposes can cause them to be included in earnings and profits * * *."